Insolvency Explained: Small Business Restructuring (SBR)

Introduction – What is Small Business Restructuring

The small business restructuring process is a relatively new insolvency appointment that allows eligible companies to:
- Retain control of their property, business and affairs while developing a plan to restructure the company. This done under the aid and guidance of a restructuring practitioner.
- Enter into a restructuring plan with creditors.

The primary goal of the SBR process is to afford greater control and flexibility to directors than in an administration whilst delivering a better return to creditors than in a liquidation setting.

SBR Appointment and Eligibility

The Small Business Restructuring process has **strict eligibility criteria**, these are:
- Total company liabilities must not exceed $1 million.
- The entitlements of all employees that are due and payable paid.
- Given all returns, notices, applications, or other documents are required by law under the Income Tax Assessment Act 1997.
- No company director or ex director within a 12-month period before the appointment of a restructuring practitioner has been subject to a SBR or simplified liquidation process in the last 7 years, unless exempt under the regulations.
- The company must not have itself undergone SBR or been subject to a simplified liquidation in the last 7 years.

It is important to note on the above that employee entitlements not yet due do not have to be paid. Additionally, tax debts do not need to paid, but returns are required to be returned for a restructuring plan to be proposed.

If the above eligibility criteria are met, directors of a company may appoint a restructuring practitioner in writing.

This is typically accomplished with the board resolving that:
- The company is insolvent, or likely to become insolvent at some time in the future.
- A restructuring practitioner should be appointed to the company.

Directors cannot resolve to appoint a restructuring practitioner if:
- The company is already involved in a restructuring process.
- The company previously made a restructuring plan that is not yet terminated.
- The company is under administration or has executed a DOCA that has not terminated.
- There is a liquidator, provisional liquidator, or administrator appointed to the company.

Currently, only a person registered as a liquidator with ASIC can act as a restructuring practitioner and assist with a restructuring plan.

Multiple practitioners can be appointed to a company and their appointment cannot be revoked. Creditors cannot vote to appoint a different restructuring practitioner.

The SBR Process

Following the appointment of a restructuring practitioner, the directors maintain control of the company business, property and affairs of the company. With the restructuring practitioner acting as an agent of the company.

Every public document and instrument must state the phrase "restructuring practitioner appointed" after the company name as it first appears. Failure to do so is an offence with strict penalties.

From the appointment of the restructuring practitioner begins the restructuring proposal period, which generally lasts **20 business days** unless ended earlier or extended.

Extensions can be granted only once by an application from the restructuring practitioner and for no more than an additional 10 business days.

During the restructuring proposal period the directors of the company must work with the restructuring practitioner to **develop a restructuring plan and restructuring proposal statement**. The restructuring plan must be executed within the restructuring proposal period.

The restructuring plan must:
- Identify the assets of the company to be dealt with.
- Specify how the assets are to be dealt with.
- Provide for the remuneration of the restructuring practitioner.
- Be expressed to be conditional on the occurrence of a specified event in a given period. This period cannot be longer than 10 business days after the day of the proposal to make the restructuring plan is accepted.

It may also authorize the practitioner of the plan to deal with identified assets in a way provided for by the plan. Or provide for any other matter relating specifically to the affairs of the company.

The restructuring plan cannot:
- Provide for the transfer of assets (excluding money) to a creditor.
- Provide for the company to make payments to a claim after three years from the acceptance date of the plan.

The practitioner must also prepare and sign a declaration, the provide creditors as soon as practicable with:
- A copy of the restructuring plan and restructuring proposal statement,
- A copy of the restructuring practitioner's declaration.
- Restructuring plan standard terms.

Provided the company has complied with the eligibility obligations, the restructuring plan is taken to be proposed on the date the above documents are provided to creditors.

In addition to the above, in order for creditors to decide whether to accept the plan, the practitioner must request:
- A statement be given about whether the plan should be accepted.
- If the creditor agrees or disagrees with the assessment of their admissible debts as set out in the proposal statement.

The acceptance period for the above is typically 15 business days but may be longer in circumstances where creditors dispute their admissible debt. A **majority in value of responding creditors** must state their acceptance of the plan.

The restructuring plan if accepted is taken to have been made on the day after the end of the acceptance period or on the day a specified event in the plan occurs.

The restructuring of the company comes to an end if:
- The company directors declare that the restructuring is to end on a specific day for any reason.
- The company fails to propose a restructuring plan within the specified restructuring proposal period.
- The company restructuring plan proposal lapses due to it not being accepted by creditors or the restructuring practitioner cancels the proposal to make a restructuring plan.
- The appointed restructuring practitioner terminates the restructuring because:
    - The company does not meet the restructuring eligibility criteria.
    - It would be against creditors best interests to make a restructuring plan.
    - It would be in the best interests of creditors for the restructuring to end
    - It would be in the best interests of creditors for the company to be wound up.

- The court orders that the restructuring is to end.
- An administrator, liquidator, or provisional liquidator is appointed.
- The company is a general insurer or life company.

SBR Director Effects and Obligations

During the restructuring period, directors maintain control of the company and are free to transact or deal with company assets provided it is within the ordinary course of company business.

If a transaction or other action is outside the ordinary business of the company, the consent of the restructuring practitioner is required. Some examples of actions outside the ordinary course of business are:
- Transactions dealing with or relating to the sale or transfer of a whole or part of the business.
- Transactions or dealings to satisfy an admissible debt or claim.
- Payment of a dividend.

The directors must assist the restructuring practitioner and provide them with information about the business, assets and affairs of the company as reasonably required.

Company directors must develop and propose the restructuring plan and restructuring proposal statement with assistance from the practitioner to be executed within the proposal period. This includes a schedule of debts and claims.

SBR Effects on Creditors

Once a restructuring practitioner is appointed, unsecured creditors cannot continue or begin to enforce a claim with the consent of the courts or practitioner.

The courts must adjourn the hearing of a winding up application if satisfied it is in the best interests of creditors to continue the restructuring.

Secured parties cannot exercise property rights, including security interest enforcement without the consent of the practitioner or courts. Additionally personal guarantees relating to company liability are stayed until restructuring termination or court leave.

As described previously, creditors must provide the restructuring practitioner with a response to the restructuring proposal within 15 business days of the provision of documents, stating their acceptance and/or dispute of claim relating to the restructuring plan.

Under a restructuring plan **all classes of creditor rank equally**, no one class is given priority in terms of repayment. Employee entitlements must be paid up to propose a restructuring plan.

In addition to being binding on creditors with debts admissible under the plan, the restructuring plan is also binding on:
- The company.
- Company officers and members.
- The restructuring practitioner for the plan.

The restructuring plan terminates when all conditions are satisfied, the company is released from all admissible claims and is entitled to any assets not required to be distributed to creditors. If the terms of the plan are fully satisfied:
- The obligations of the company under the plan have been fulfilled.
- The obligations of any other party to the plan have been fulfilled.
- All admissible debts or claims have been dealt with in accordance with the plan.

If the plan terminates for any other reason, any other admissible debt or claim that has not been dealt with by the plan becomes due and payable on the next business day after the termination occurs.

Restructuring Practitioner Roles and Remuneration

The main roles of the restructuring practitioner are as follows:
- To receive money from the company and hold on trust as necessary.
- Pay money to creditors in accordance with the restructuring plan.
- Realise assets of the company to pay creditors as required by the plan and requested by directors.
- Distribute proceeds of asset realisation to pay creditors as required by the plan and requested by directors.

- Answer questions about the exercise of any functions or powers they may have as a practitioner under the plan.
- Do anything that can be considered incidental to the exercise of their powers and function.
- Do anything considered necessary or convenient for the purposes of restructuring plan administration.

The restructuring plan as approved by creditors provides for the remuneration of the practitioner. The plan may specify:

- An amount of remuneration as a percentage of payments made to creditors in accordance of the plan.
- A method for working out an amount of remuneration that, in the event the board consents in writing to beginning or proceeding with proceedings relating to the plan, the practitioner would be entitled to receive for work performed in relation to the proceedings.

Restructuring Plan Termination

A restructuring plan is taken to be terminated:

- On the day which under the plan, the company's obligations of any other party to the plan have been fulfilled and all admissible claims are dealt with.
- If the court terminates the plan, with the termination date taken to be on the day specified in the order.
- If the plan is subject to the occurrence of an event within a specific period (no longer than 10 business days after the acceptance date) and that event does not occur, then the plan is terminated on the next business day.
- If the plan is contravened by a person bound by the plan and is not rectified within 30 business days of the breach. Termination occurs the next business day after the end of the 30-business day period.
- If an administrator, liquidator, or provisional liquidator is appointed.

Conclusion: Main Benefits of Small Business Restructuring

The main benefits for this type of appointment are primarily in the freedom and flexibility it offers directors and the company.

Unlike an administration, a restructuring plan places the restructuring practitioner in a mostly advisory role, allowing the directors to put a plan into action that serves the best interests of creditors and the company. Whilst still being afforded the breathing room that an administration provides.

Much like an administration, the return to creditors is also preferable to a liquidation, and the business can continue to trade after it has terminated successfully.